

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

File No. 1:03-CR-203

ERNESTO McKINNEY,

Defendant.

---

Supervised Release Violation Hearing

Before

THE HONORABLE GORDON J. QUIST  
United States District Judge  
September 7, 2017

APPEARANCES

DAVIN REUST  
Assistant U.S. Attorney  
P.O. Box 208  
Grand Rapids, MI 49501  
Attorney for Plaintiff

RICHARD E. ZAMBON  
202 Waters Bldg.  
161 Ottawa Ave., NW  
Grand Rapids, MI 49503  
Attorney for Defendant

Kevin W. Gaugier, CSR-3065  
U.S. District Court Reporter

Grand Rapids, Michigan

September 7, 2017

3:12 p.m.

- - -

P R O C E E D I N G S

THE COURT: Good afternoon. Please be seated.

This is the case of United States of America against Ernesto McKinney, docket number 1:03-CR-203-04, time set for a hearing on whether or not Mr. McKinney violated terms and conditions of his supervised release. Can I have the appearance of counsel, please?

MR. REUST: Good afternoon, Your Honor. Davin Reust for the United States, and seated next to me at counsel table is Probation Officer VanderVelde.

THE COURT: Thank you.

MR. ZAMBON: Good afternoon, Your Honor. Richard Zambon appearing on behalf of Defendant Ernesto McKinney who is in court.

THE COURT: Okay. Thank you. Has each party received a copy of the alleged violations, Mr. Reust?

MR. REUST: Yes, Your Honor.

MR. ZAMBON: Yes, Your Honor.

THE COURT: You can remain seated for this, Mr.

1 Zambon. Have you gone over them with your client, Mr. Zambon?

2 MR. ZAMBON: I have, Your Honor.

3 THE COURT: Is that correct, Mr. McKinney?

4 DEFENDANT McKINNEY: Yes, Your Honor.

5 THE COURT: Okay. What I'm going to do, Mr.  
6 McKinney, is read the alleged violations to you and ask you  
7 how you're going to plead to those. The government must  
8 establish the alleged violations by a preponderance of the  
9 evidence. If the government fails to do this, you will be  
10 adjudicated not guilty of the allegations.

11 You have the right to cross-examine witnesses  
12 brought by the government. You have the right to use your  
13 retained counsel or court-appointed counsel.

14 Are you court-appointed?

15 MR. ZAMBON: I am, Your Honor.

16 THE COURT: Okay. Thank you, Mr. Zambon.

17 You'll be given the opportunity to speak if you are  
18 found guilty. You'll be given the opportunity to speak in  
19 mitigation before any punishment is determined by me. Do you  
20 understand all these rights, sir?

21 DEFENDANT McKINNEY: Yes, Your Honor.

22 THE COURT: Okay. I will now read the alleged  
23 violations to you, sir. I want to make sure I've got the  
24 right ones here. Yes, I do, because we've had two of these  
25 hearings in a short period of time.

1           Alleged violation number one is of the following  
2           mandatory condition: Defendant shall not commit another  
3           federal, state, or local crime. It's alleged that on or about  
4           July 27, 2017, through August 8, 2017, Mr. McKinney possessed  
5           and used cocaine. Possession of cocaine less than 25 grams is  
6           a violation of Michigan law, a felony, and this is a  
7           subsequent -- second or subsequent offense. The penalty is  
8           subject to an enhancement for an additional two years, so it  
9           could be up to six years in prison. Do you understand that  
10          charge, sir?

11                 DEFENDANT MCKINNEY: Yes, Your Honor.

12                 THE COURT: And how do you plead, sir, guilty or not  
13          guilty?

14                 DEFENDANT MCKINNEY: Guilty.

15                 THE COURT: Guilty, okay.

16           Violation number two, standard condition number  
17          seven. Defendant shall refrain from use of alcohol and shall  
18          not possess, purchase, possess, use, distribute or administer  
19          any controlled substance or any paraphernalia related to any  
20          controlled substances except as prescribed by a physician.  
21          It's alleged that on or about July 27, 2017, through August 8,  
22          2017, you used and possessed cocaine. Do you understand that  
23          charge?

24                 DEFENDANT MCKINNEY: Yes, Your Honor.

25                 THE COURT: And how do you plead, sir, guilty or not

1 guilty?

2 DEFENDANT McKINNEY: Guilty.

3 THE COURT: All right. Did you take a look at the  
4 supporting evidence on that and go over that with him, Mr.  
5 Zambon?

6 MR. ZAMBON: I did, Your Honor.

7 THE COURT: Okay. Mr. McKinney, do you agree that  
8 it's substantively correct, what it says there under  
9 supporting evidence and information?

10 DEFENDANT McKINNEY: Yes, Your Honor.

11 THE COURT: Okay. Then you're adjudicated guilty of  
12 those violations. That's a Grade B violation for violation  
13 number one. Possession/use of cocaine is a Grade C  
14 violation. The most serious grade is B.

15 He has a criminal history category of IV. That  
16 carries a penalty of 12 to 18 months under the policy  
17 guidelines, and they're only policy statements. They never  
18 were the so-called mandatory guidelines. Even they weren't  
19 really mandatory, but they're called that.

20 The recommendation to me, however, is a sentence  
21 longer than that, a sentence of 24 months, and that's where we  
22 are. And the rationale I think you have, I mean, he was just  
23 here in July, for one thing, and hope for the best and got the  
24 worst. Anyway, why don't we stand up there for allocution. I  
25 read his letter.

1 MR. ZAMBON: Thank you, Your Honor.

2 If it please the Court, I was first assigned to  
3 represent Mr. McKinney when he applied for a sentence  
4 reduction back in about 2012, and I remember filing 63  
5 certificates of accomplishment that Ernesto had obtained while  
6 in prison, so he kept very busy when he was sentenced  
7 originally. He I understand had very little problems in  
8 prison. He was, you know, pretty much a model prisoner.

9 He applied for the RDAP program but was unable to  
10 take that program because eventually this Court did reduce his  
11 sentence, and due to timing issues he was unable to take the  
12 500-hour program, which I think would have been very  
13 beneficial to him. He did take a 40-hour drug treatment  
14 program while in prison. Obviously not enough help for him.

15 When Ernesto got out of prison, he was sentenced to  
16 halfway house, and within two weeks he had obtained a job  
17 there at the halfway -- while still in the halfway house, and  
18 then he was released from the halfway house after I think it  
19 was 30 days. So he was doing very well there. He was  
20 steadily employed all the time he's been on supervised  
21 release.

22 My understanding is his jobs have always been better  
23 and better. He started off at McDonald's as a general laborer  
24 and was there for six to eight months, got a job at Notions in  
25 Grand Rapids, which is a seasonal distributor for Anson

1 Packaging. He then went to Dennen Steel and worked there, got  
2 a job as a janitor, ended up at Label Tape in Caledonia. He  
3 was able to get those jobs which were out of the area for  
4 him -- Dennen Steel is a bit of a drive, Caledonia is a bit of  
5 a drive -- but did he that because he had a driver's license,  
6 and he started making some pretty good choices.

7 He bought a car, got an apartment. His girlfriend  
8 had a child, was born I think three months premature and was  
9 in neonatal care for a substantial period of time. About that  
10 time is when he started slipping, started using, and was in  
11 complete denial as the Court sees from the report and from his  
12 conferences with you. I think he's been before you before, as  
13 you said, in July. He was in denial as to his use and his  
14 dependence on cocaine.

15 When I met with him we discussed all those issues.  
16 He realizes he has this huge problem. If you call it the  
17 monkey on his back, it's tremendously large. It's  
18 gorilla-sized, obviously. He wishes that he had availed  
19 himself of the help that was offered him through the Probation  
20 Department and this Court gave him the opportunity, and as you  
21 can see from his letter, he is serious about the fact that he  
22 needs help. He acknowledges and he asks the Court to give him  
23 a chance, put him back into some kind of supervised release,  
24 you know, after some short jail sentence in the halfway house  
25 so he can learn how to deal with the issues in his life.

1 Thank you, Your Honor.

2 THE COURT: Thank you.

3 Mr. McKinney, anything you'd like to say?

4 DEFENDANT McKINNEY: Yeah. I just want to apologize  
5 to the courts and to Amy. I apologized to her like a week  
6 before I got locked up or whatever, you know, for what I was  
7 doing, and I just want another chance to, you know, try to get  
8 some type of help.

9 THE COURT: Well, there's an old saying, isn't  
10 there, Mr. McKinney? One time -- what is it? Fooled once,  
11 sorry, you know, for me. Fooled twice, really bad for me.  
12 And so here we have it. Just a couple of months ago you were  
13 here and given a break. Yeah, and -- well, you raised your  
14 hand, so --

15 DEFENDANT McKINNEY: No, go ahead, and I haven't  
16 used. I haven't did nothing since then, since I left the  
17 court.

18 THE COURT: Okay. I thought that this use came  
19 afterwards.

20 DEFENDANT McKINNEY: It did, but I was already  
21 dirty when they put the patch on me.

22 THE COURT: So you're saying you didn't use, but it  
23 came back dirty anyway? It lasts about seven days.

24 DEFENDANT McKINNEY: Right. That's what I told my  
25 PO. I said -- I asked Amy, I said, Man, just give me one more



1 week because I know my system will be clean.

2 THE COURT: Ms. VanderVelde?

3 PROBATION OFFICER VANDERVELDE: I'm sorry, Your  
4 Honor?

5 THE COURT: Did he use after the last time we were  
6 here together?

7 PROBATION OFFICER VANDERVELDE: Yes, Your Honor.

8 THE COURT: And what was -- let me just check these  
9 dates again. We had this hearing --

10 DEFENDANT McKINNEY: July 27th.

11 THE COURT: All right. Our hearing was -- I don't  
12 have it here.

13 PROBATION OFFICER VANDERVELDE: It was July 27, Your  
14 Honor.

15 THE COURT: The hearing was July 27?

16 PROBATION OFFICER VANDERVELDE: Correct, Your Honor.

17 THE COURT: And then when did he use, July 27?

18 PROBATION OFFICER VANDERVELDE: There was a patch on  
19 from July 27 through August 3 that was positive for cocaine  
20 and then another patch on August 7. Sorry, that was a drug  
21 use. That was a UA drug test, so a urinalysis. That was  
22 positive for cocaine, and then we had another sweat patch on  
23 August 3 through August 8 that was positive for cocaine, and  
24 cocaine use only stays in your system approximately 36 hours,  
25 Your Honor.

1 THE COURT: Yeah, but the metabolite stays there a  
2 little bit longer.

3 PROBATION OFFICER VANDERVELDE: There's a cutoff,  
4 Your Honor, for the patches. There was two patches and one  
5 urine, Your Honor.

6 THE COURT: And one urine. They all tested  
7 positive?

8 PROBATION OFFICER VANDERVELDE: Correct.

9 THE COURT: Okay. That would have caught it, then.  
10 Okay. Anything from the government? Oh, I'm sorry, Mr.  
11 McKinney. Did you want to say anything?

12 DEFENDANT MCKINNEY: No, I've said it all.

13 THE COURT: Okay. You may be seated. Mr. Reust?

14 MR. REUST: Very briefly, Your Honor.

15 The Court's obviously much more familiar with this  
16 case than I am and knows that Mr. McKinney had two positive  
17 sweat patches which resulted in a July 27 hearing where the  
18 Court was lenient with Mr. McKinney, and instead of revoking  
19 his supervised release, simply ordered that he continue to  
20 wear sweat patches. So he put one on that day on August 3,  
21 tested positive. On August 7 Mr. McKinney took a urinalysis  
22 test and that was also positive, and then he wore another  
23 sweat patch from August 3 to August 8 which was positive, and  
24 now as high as August 14th he failed to report to have a new  
25 patch put on.

1           Your Honor, I looked back through Mr. McKinney's  
2     initial PSR, and what he said there gave me concern for the  
3     violation that he's here for today. In the PSR in  
4     Paragraph --

5           THE COURT: Hold on a minute. I have it right  
6     here. What paragraph are you referring to?

7           MR. REUST: 263.

8           THE COURT: 263. Do you have that, Mr. Zambon?

9           MR. ZAMBON: I do not have that with me. I have  
10    reviewed the report in the past. If I could take a quick  
11    glance.

12          MR. REUST: I was just going to give --

13          THE COURT: I've got it here now.

14          MR. REUST: -- a brief summary. In effect, Mr.  
15    McKinney stated that he began selling drugs to finance his own  
16    drug habit, and obviously here he's saying he slipped and  
17    began using drugs, so there's clearly a concern here that that  
18    may slip further if Mr. McKinney were to continue to use  
19    narcotics. So the government's position is in line with the  
20    Probation Department's position in requesting the 24 months of  
21    incarceration for Mr. McKinney.

22          THE COURT: All right. Well, I think the  
23    recommendation by the Probation Department is right on. It's  
24    a little bit above the policy guidelines, but considering all  
25    the facts and circumstances of the case, especially the fact

1 that he was given the opportunity before and he wasn't  
2 forthcoming. I was told until today that he was going to  
3 object to everything here, which is his right, and I don't  
4 hold that against him except it goes to really acceptance of  
5 responsibility for his acts.

6 MR. ZAMBON: Your Honor, if I may address that?

7 THE COURT: Yeah.

8 MR. ZAMBON: I advised the Court overnight in an  
9 email that we would not be contesting.

10 THE COURT: I didn't say that. I heard about it  
11 today. I heard it today for the first time.

12 MR. ZAMBON: When we were exchanging emails back and  
13 forth, I --

14 THE COURT: She's nodding. I didn't see it.

15 MR. ZAMBON: As soon as I met with Mr. McKinney up  
16 at the jail after the initial appearance, he told me he wanted  
17 to plead guilty and I let the Court know.

18 THE COURT: Okay. Well, I'm sorry, then. I'm  
19 wrong.

20 MR. ZAMBON: Thank you, Your Honor.

21 THE COURT: All right. But he was convicted of  
22 conspiracy to possess with intent to distribute five kilograms  
23 or more of cocaine base, also known as crack cocaine. I was  
24 just given a -- I probably was given it and I never saw it.  
25 Here it is, 8/22. "I spoke with Mr. McKinney yesterday and he

1 does not wish to contest." Okay. First time I've seen it.

2 Anyway, he possessed a firearm as one of his drug  
3 trafficking tools, a sawed-off shotgun that can loaded with  
4 buckshot. At the time of his original sentence he had an  
5 offense level 37 and criminal history level of IV at that  
6 time, used Ecstasy and other drugs. In other words, he had a  
7 big drug problem.

8 His sentencing guideline range was 292 to 365  
9 months. He was sentenced to 292 months, but the sentence was  
10 lowered to 172 months pursuant to 18 United States Code  
11 Section 3582(c). The severe drug problems are important  
12 because drug users also become drug dealers and Mr. McKinney  
13 was a drug dealer, so he's back with the same crowd he was  
14 before. In fact, he was convicted in this court and other  
15 courts of drug dealing.

16 He tested positive for illegal use that was  
17 sanctioned by my sentencing him to five months in the  
18 Residential Reentry Center for five months. He was required  
19 to use a sweat patch, and like I said, here we are again.

20 Also, he was in the company of a guy named Marcus  
21 Palmer, another felon and a state parolee, when he, Mr.  
22 McKinney, was stopped by the Grand Rapids Police Department.  
23 The police said that they smelled marijuana odor emitting from  
24 his person. Mr. McKinney denied knowing Mr. Palmer was a  
25 convicted felon. I tend to doubt that. People know at least

1 usually that much about someone else. He knew Mr. Palmer well  
2 enough to get into a car with Mr. Palmer and Mr. Palmer let  
3 him do so. Doesn't really make any difference in sentencing.  
4 I just mention that because it gives me some concern, but I'm  
5 giving him the benefit of the doubt on that.

6 He also -- he took responsibility for this, but like  
7 I said before, he was given the opportunity before. The  
8 probation officer recommends I sentence Mr. McKinney above the  
9 guideline policy range. In my judgment he doesn't learn his  
10 lessons. In my judgment he doesn't take responsibility for  
11 his acts, and it can lead to trouble not only for him, but  
12 also for the community to whom these products are sold.

13 Therefore, the sentence will be the 24 months  
14 suggested. I think that was it. Okay. He'll have three  
15 years of supervised release to follow. This is subject to any  
16 final objection, by the way. Three years of supervised  
17 release to follow, and during that he will participate in a  
18 program of testing and treatment for substance abuse as  
19 directed by the probation officer and follow the rules as  
20 directed by the probation officer, pay at least a portion of  
21 the costs according to his ability, must not use/possess any  
22 alcoholic beverage and not frequent any establishment whose  
23 primary purpose is the sale or serving of alcohol. He must  
24 reside at the Residential Reentry Center as designated by the  
25 Bureau of Prisons for a period of six months and while at the

1 Center abide by all rules and regulations of the program and  
2 shall receive work release at the direction of the probation  
3 officer.

4 Mr. McKinney, you have the right to appeal your  
5 sentence. You must file a notice of intention to appeal if  
6 you want to appeal within 14 days of today. You tell Mr.  
7 Zambon you want to file that notice and you tell him as soon  
8 as you can because it takes him some time to prepare it and  
9 get it over here.

10 Other than that, Mr. Reust, anything from the  
11 government?

12 MR. REUST: No, Your Honor, thank you.

13 THE COURT: Mr. Zambon?

14 MR. ZAMBON: No, thank you, Your Honor.

15 THE COURT: All right. We're adjourned. Thank  
16 you.

17 (Proceedings concluded at 3:28 p.m.)  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

I, Kevin W. Gaugier, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript was prepared by me.

/s/ Kevin W. Gaugier

Kevin W. Gaugier, CSR-3065  
U.S. District Court Reporter  
110 Michigan N.W.  
622 Federal Building  
Grand Rapids, MI 49503